

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
CoxCom, Inc. d/b/a/ Cox)	CSR 7081-E
Communications Tucson)	CSR 7082-E
)	CSR 7083-E
Petition for Determination of Effective)	CSR 7084-E
Competition)	CSR 7085-E
)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: March 8, 2007

Released: March 9, 2007

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. CoxCom, Inc. d/b/a/ Cox Communications Tucson ("Cox") has filed a petition with the Commission for determinations of effective competition in 16 Arizona franchise areas (the "Communities")¹ pursuant to Section 623(a) of the Communications Act² and the Commission's implementing rules.³ Cox alleges that its cable systems serving these communities are subject to effective competition and, therefore, are exempt from cable rate regulation. Specifically, Cox claims that the effective competition present in the Communities arises from the competing services provided by two unaffiliated direct broadcast satellite ("DBS") providers, DirecTV, Inc. and EchoStar Satellite, L.L.C. As a result, Cox asserts that it is subject to effective competition in these franchise areas under the "competing provider" test or the "low penetration" test set forth in Sections 623(1)(1)(A) and (B) of the Communications Act. No opposition to the petition was filed. Finding that Cox is subject to effective competition in the franchise areas, we grant the petition.

¹See Petition at 1-3. The communities are: AZ0216 (South Tucson), AZ0190 (Davis-Monthan AFB), AZ0134 and AZ0130 (Green Valley, Unincorp. Pima), AZ0250 (Santa Rita Bel Aire), AZ0281 (Pima County-Tucson) in Pima County, Arizona (CSR-7081-E); AZ0046 (Huachuca City), AZ0088 (Tombstone), AZ0248 (Coronado/Whetstone), AZ0060 and AZ0258 (Sierra Vista Unincorp. a/k/a SE Sierra Vista/Nicksville) in Cochise County, Arizona (CSR-7082-E); AZ0038 (Willcox), AZ0066 (Benson), AZ0280 (St. David), and AZ0251 (Sunsites) in Cochise County, Arizona (CSR-7083-E); AZ0011 (Douglas), AZ0300 (Douglas Unincorp. a/k/a Pirtleville) in Cochise County, Arizona (CSR-7084-E); and AZ0056 (Pategonia) in Santa Cruz County, Arizona (CSR-7085-E). In an addendum filed December 5, 2006 Cox added CUID No. AZ0281 (Pima County-Tucson), which uses the same physical system as the communities of South Tucson, Davis-Monthan AFB, Green Valley, and Santa Rita Bel Aire.

²47 U.S.C. § 543(a).

³47 C.F.R. § 76.905(b).

II. DISCUSSION

A. Competing Provider Effective Competition

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁴ as that term is defined by Section 623(l)(1) of the Communications Act⁵ and Section 76.905 of the Commission's rules.⁶ A cable operator bears the burden of rebutting the presumption that effective competition does not exist by producing evidence that shows effective competition is present in the relevant franchise area.⁷

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if its franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors ("MVPD"), each of which offer comparable programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in the franchise area.⁸

4. Turning to the first prong of this test, DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in the franchise area are made reasonably aware that the service is available.⁹ The two DBS providers' subscriber growth reached approximately 26.1 million as of June 2005, comprising approximately 27.7 percent of all MVPD subscribers nationwide; DirecTV has become the second largest, and EchoStar has become the third largest, MVPD provider.¹⁰ Because the two DBS providers have a nationwide footprint and serve well over 20 percent of all MVPD subscribers nationwide, we believe these statistics support the presumption that Cox's franchise areas are within their satellite footprint. Moreover, Cox has provided sufficient evidence of DBS advertising in local, regional, and national media that serves the franchise areas.¹¹ We conclude that the population of the franchise areas may be deemed reasonably aware of the availability of DBS services for the purposes of the first prong of the competing provider test. With respect to the issue of program comparability, we find that the DBS providers' programming satisfies the Commission's program comparability criterion because DirecTV and EchoStar offer more than 12 channels of video programming, including more than one non-broadcast channel.¹² We find further that Cox has demonstrated that the franchise areas are served by at least two unaffiliated MVPDs, namely the two DBS providers, each of which offers comparable video programming to at least 50 percent of the households in the Communities. Therefore, the first prong of the competing provider test is satisfied.

⁴ 47 C.F.R. § 76.906.

⁵ 47 U.S.C. § 543(l)(1).

⁶ 47 C.F.R. § 76.905(b).

⁷ See 47 C.F.R. §§ 76.906 & 76.907(b).

⁸ 47 U.S.C. § 543(l)(1)(B); see also 47 C.F.R. § 76.905(b)(2).

⁹ See *MediaOne of Georgia*, 12 FCC Rcd 19,406 (1997).

¹⁰ See *Twelfth Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 06-11, 21 FCC Rcd 2503 at ¶¶ 6, 13, 72-73 (rel. March 3, 2006).

¹¹ See Petition at 6-7 and Exhibits 3 ("National and Local Advertising and Marketing Material, DirecTV and Dish Network") and 4 ("DBS Retailers").

¹² See 47 C.F.R. § 76.905(g); see also Petition at 5 (providing that DirecTV and EchoStar offer "more than 200 channels of broadcast and nonbroadcast video programming") & Exhibit 2 (the Channel Line-ups of DirecTV and EchoStar).

5. The second prong of the competing provider test requires that the number of households subscribing to MVPDs other than the largest MVPD exceeds 15 percent of the households in a franchise area. Cox asserts it is the largest MVPD in certain franchise areas where it claims to be subject to competing provider effective competition.¹³ Cox adds that it is unable to determine which MVPD is the largest in other areas, where only aggregate DTH subscriber data is available.¹⁴ However, it claims to be subject to competing provider competition in these communities because DBS penetration exceeds 15 percent of occupied households, and because the number of Cox subscribers also exceeds 15 percent of the occupied households, as reported by the 2000 Census.¹⁵

6. Cox determined the competing provider penetration levels in the franchise areas by applying a five-digit zip code allocation method.¹⁶ To calculate the DBS firms' subscribership in each franchise area, Cox purchased an Effective Competition Tracking Report ("ECTR") from the Satellite Broadcasting and Communications Association ("SBCA"). The SBCA reports the total DBS and DTH subscribers for the relevant zip codes in Cox's franchise areas.¹⁷ To account for differences between the zip code boundaries used in the ECTR and the specific boundaries of the franchise areas, Cox multiplied the SBCA zip code data by derived allocation percentages to estimate the number of DBS and DTH subscribers within the franchise areas.

7. To calculate the allocation percentages, Cox divided the number of occupied households in each community by the number of occupied households in the five-digit zip code areas located either wholly or partially within the community. Cox obtained occupied household data for each of the five-digit zip codes located partially or wholly in each franchise area, and for most of the communities, from the 2000 U.S. Census.¹⁸ In three franchise areas where community-level census data was unavailable, Cox estimated the number of occupied households for each franchise area by adjusting the number of homes passed by Cox cable systems as of September 30, 2006, reported in Cox corporate records, for the county-wide vacancy rates reported by the 2000 U.S. Census.¹⁹ The resulting allocation percentages were

¹³ Petition at 8 & Exhibit 5 ("Cox Customers Served in the Communities"), Addendum at 2. Cox asserts that it has more subscribers than the aggregate total of DBS customers in each of the following communities: Pima County-Tucson, South Tucson, Green Valley/Unincorp. Pima, Douglas, and Douglas Unincorp. a/k/a Pirtleville.

¹⁴ Petition at 8. The communities are: Huachuca City, Tombstone, Coronado/Whetstone, Sierra Vista Unincorp. a/k/a SE Sierra Vista/Nicksville, Willcox, Benson, St. David, Sunsites, and Patagonia.

¹⁵ Petition at 9. The Commission has recognized that where aggregate DBS penetration and cable operator penetration each exceed 15 percent in the franchise area, the second prong of the competing provider test is satisfied. *See Adelphia Communications, et al.*, 19 FCC Rcd 18724 at ¶ 4 (Med. Bur. 2004) (citing *Time Warner Entertainment Advance/Newhouse Partnership, et al.*, 17 FCC Rcd 23587, 23589 (Med. Bur. 2002)).

¹⁶ Petition at 10-13 & n.36 (citing, e.g., *Amzak Cable Midwest, Inc. and Minnesota Cable Properties, Inc. Petition for Determination of Effective Competition in Eleven Minnesota Communities*, 19 FCC Rcd. 6208, ¶¶ 6, 11-13 (2004); *Texas Cable Partners, L.P., Petition for Determination of Effective Competition in Eleven Texas Communities*, 19 FCC Rcd. 6213, ¶¶ 7-9 (2004)).

¹⁷ Petition at 9 & Exhibit 6 ("Effective Competition Tracking Report").

¹⁸ Exhibit 1 ("2000 Census Data by City and Zip Code and Excerpts from Census Bureau Definitions of Subject Characteristics"). *See also* Declaration of Veronica Lingenfelter, Quality Consultant, Southern Arizona, Cox Communications, reporting that responsible base officials counted 996 occupied housing units and 1,256 total housing units on Davis-Monthan AFB.

¹⁹ Census data was unavailable for Sunsites, Santa Rita Bel Aire, and Pima County-Tucson. *See* Petition at 11-12 & Declaration of Michael A. DiMaria, Director of Government Relations, Southern Arizona, Cox Communications, and Addendum at 2-4. *See also Cable TV Del Norte*, 13 FCC Rcd 12512, 12516 at ¶¶ 8, 11 (Cab. Serv. Bur. 1998) ("We find that Cable TV's determination of current subscribers based upon its audit of households in the franchise area is an acceptable and reliable method of determining a cable operator's penetration rate."); *Americable*

(continued....)

then applied to the number of DBS subscribers reported in the ECTR to calculate the total number of DBS and DTH subscribers in each franchise area. The number of subscribers, divided by the number of occupied households, yields the DBS subscriber penetration level for the corresponding franchise area.²⁰

8. Based upon the DBS subscriber penetration levels, we find that Cox has demonstrated that the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the Communities listed in Attachment A, "Competing Provider Test." Therefore, the second prong of the competing provider test is satisfied. Based on the foregoing, we conclude that Cox has submitted sufficient evidence demonstrating that its cable systems serving the Communities set forth in Attachment A, "Competing Provider Test," are subject to competing provider effective competition.

B. Low Penetration Effective Competition

9. Section 623(l)(1)(A) of the Communications Act provides that a cable operator is subject to effective competition, and therefore exempt from cable rate regulation, if "fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system."²¹ For the Communities listed in Attachment A, "Low Penetration Test", Cox provided information showing that fewer than 30 percent of the households within the franchise areas subscribe to its cable service. Based on this record, we conclude that Cox has demonstrated the existence of low penetration effective competition under our rules in the listed Communities.

III. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED** that the Petitions for Determination of Effective Competition in the Arizona Franchise Areas, as set forth in Attachments A and B, filed by CoxCom, Inc. d/b/a/ Cox Communications Tucson **ARE GRANTED**.

11. **IT IS FURTHER ORDERED** that the certifications to regulate basic cable service rates granted to any of the local franchising authorities in the related Arizona Franchise Areas overseeing CoxCom, Inc. d/b/a/ Cox Communications Tucson **ARE REVOKED**.

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broecker
Deputy Chief, Policy Division
Media Bureau

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International Arizona, Inc., 11 FCC Rcd 11588 ¶¶ 12, 15 (Cab. Serv. Bur. 1996) (accepting current data from alternative sources when Census data is unavailable).

²⁰ Petition at 8 & Exhibit 6 ("Competing Provider Franchise Allocation and Penetration Calculations and Chart of Communities and Associated Residential Zip Codes").

²¹ 47 U.S.C § 543(l)(1)(A).

ATTACHMENT A

File Numbers CSR 7081-E, CSR 7082-E, CSR 7083-E,
CSR 7084-E, and CSR 7085-E

FRANCHISE AREAS SERVED BY COXCOM, INC.
d/b/a Cox Communications Tucson

COMPETING PROVIDER TEST

FRANCHISE AREA COMMUNITY	OCCUPIED HOUSEHOLDS ²²	DBS CUSTOMERS (Allocated)	DBS COMPETING PROVIDER PENETRATION
Cochise County:			
Huachuca City	713	458.9	64.4%
Tombstone	694	436.3	62.9%
Willcox	1,383	985.3	71.2%
Benson	2,084	1,249.8	60.0%
Douglas	4,526	1,315.2	29.1%
Coronado/Whetstone	904	581.8	64.4%
SE Sierra Vista/Nicksville	5,392	2,153.5	39.9%
St. David	666	387.3	58.2%
Douglas Unincorp. (Pirtleville)	454	131.9	29.1%
Sunsites	494	362.8	73.4%
Pima County:			
South Tucson	1,810	321	17.7%
Green Valley	9,995	2,309.7	23.1%
Pima County-Tucson	16,244	3,926.7	24.2%
Santa Cruz County:			
Pategonia	404	224.1	55.5%

LOW PENETRATION TEST

FRANCHISE AREA COMMUNITY	OCCUPIED HOUSEHOLDS	COX CUSTOMERS ²³	TOTAL COX PENETRATION
Cochise County:			
Coronado/Whetstone	904	219	24.2%
Sunsites	494	125	25.3%
Pima County:			
South Tucson	1,810	493	27.2%
Davis-Monthan AFB	996	196	19.7%
Santa Rita Bel Aire	345	19	5.5%
Santa Cruz County:			
Pategonia	404	97	24.0%

²² See Petition at Exhibit 1 & Addendum at Attachment 4.

²³ Petition at Exhibit 5 ("Cox Customers Served in the Communities").